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Labour Migration, Trade and Investment:

From Fragmentation to Coherence

Thomas Cottier* and Charlotte Sieber-Gasser†

ABSTRACT

Trade, investment and migration are strongly intertwined, being three key factors in international production. Yet, law and regulation of the three has remained highly fragmented. Trade is regulated by the WTO on the multilateral level, and through preferential trade agreements on the regional and bilateral levels – it is fragmented and complex in its own right. Investment, on the other hand, is mainly regulated through bilateral investment treaties with no strong links to the regulation of trade or migration. And, finally, migration is regulated by a web of different international, regional and bilateral agreements which focus on a variety of different aspects of migration ranging from humanitarian to economic.

The problems of institutional fragmentation in international law are well known. There is no organizational forum for coherent strategy-making on the multilateral level covering all three areas. Normative regulations may thus contradict each other. Trade regulation may bring about liberalization of access for service providers, but eventually faces problems in recruiting the best people from abroad. Investors may withdraw investment without being held liable for disruptions to labour and to the livelihood and infrastructure of towns and communities affected by disinvestment. Finally, migration policies do not seem to have a significant impact as long as trade policies and investment policies are not working in a way that is conducive to reducing migration pressure, as trade and investment are simply more powerful on the regulatory level than migration.

This chapter addresses the question as to how fragmentation of the three fields could be remedied and greater coherence between these three areas of factor allocation in international economic relations and law could be achieved. It shows that migration regulation on the international level is lagging behind that on trade and investment. Stronger coordination and consideration of migration in trade and investment policy, and stronger international cooperation in migration, will provide the foundations for a coherent international architecture in the field.

I. INTRODUCTION

Today, we can fly to the world's most distant island within a day, we can communicate in real time with the whole planet, and many of us are happy to consider job offers outside our home countries. The global village has become our home and migration is just another feature of modern life. Yet, there are few global norms to guide our global endeavours and these norms often – coming as they do from the three different angles of trade, investment and migration – are not in mutual harmony. As in other areas, international law has been highly functional and fragmented. International trade regulation is itself fragmented (see Cottier and Delimatsis, 2011). Investment protection largely depended upon bilateral agreements and, in the absence of a multilateral framework, evolved independently of trade and migration. And, finally, migration developed without due regard to trade and investment regimes. Thus, trade, investment and migration policies are often incoherent, resulting in legal fragmentation which is best illustrated by the 'liberal paradox' of labour migration: while companies need to recruit labour across borders, migration authorities relentlessly work at limiting immigration of those seeking work. Yet, as the costs of communication, transport and travel have dropped in parallel to the reduction of barriers to trade, it is easier for people to cross borders today. Thus, more migration is occurring, and border crossings are taking place at a faster rate than ever before, a phenomenon which Castles and Miller have termed the 'globalization of migration' (see Castles and Miller, 2003).

Meanwhile, firms have discovered that it may often be less costly to relocate production abroad than to hire foreign workers. Thus, outsourcing and foreign direct investment (FDI) may at times replace labour migration. In addition, where FDI takes place, it may reduce the incentive to migrate. Trade liberalization on the other hand, should – at least in theory – lead to more prosperity and wealth even in poorer regions through diversification of products, added-value chains and lower prices. Thus, trade policy may also have an impact on the in-

centive to migrate. Thus, both FDI and trade liberalization minimize the root causes (or push-factors) of migration, while protectionist trade policy, notably agricultural protectionism, displaces or destroys jobs in the developing world and may lead to aggravation of the root causes of migration. European integration is a case in point: free movement of goods, services and of capital has reduced the need for internal migration, which has never exceeded more than about five per cent of the overall population of the European Union.

However, instead of addressing and targeting the root causes of migration – both push- and pull-factors – migration policies today target the result of the phenomenon (Castles, 1998, p. 182). Given that the root causes of migration are buried in other policy areas like trade or investment, it is somewhat surprising that migration policy is to a large extent focused on, and limited to, managing migration flows, protecting national borders and dealing with displaced persons. These policies, which address symptoms rather than causes, inevitably lag behind and are unable to solve problems on their own.

At the same time, it is difficult, if not impossible, to tackle the root causes of migration in isolation, as they 'lie in the imbalances of power and resources in the global political economy, and addressing them would require a major transformation in the distribution of power and resources worldwide' (Castles and Van Hear, 2011, p. 287). While the more recent migration policies targeting the root causes of migration pressure are morally preferable to border control measures, both policy lines have failed to produce results. Castles and Van Hear thus see the right way forward as going beyond policies of border control and root causes, and taking into account the interdependence of migration with other key areas in global relations, such as trade, investment, security, and international politics (Castles and Van Hear, 2011, pp. 302–3). Such linkages exist, for example, between migration, labour and investment.

From a macroeconomic and long-term perspective, limiting migration is not in the interest of the labour force: because it keeps labour out of international competition, labour is kept from becoming a profit sector in production. Being a profit sector in production automatically renders that sector worthy of protection and investment for business owners. Thus, limiting labour migration limits the protection of labour and the awareness of the value and scarcity of human resources in production (Keely, 2003, p. 91).

For market economies, several studies have shown that free movement of labour actually reduces unemployment whereas erecting barriers to labour movement hinders long term welfare gains and may have a negative impact on unemployment rates (Heid and Larch, 2011). Thus, free movement of labour, subject to adjustment and welfare policies, is also in the interest of the labour force in the receiving countries (Cottier, 2013), contrary to what many politicians currently tend to argue.

The all-encompassing and unconditional protection of FDI is contradictory to migration and development policies: while attracting FDI is fundamental for economic growth – particularly in the South – withdrawing it at the first sign of lower profits may have detrimental impacts on unemployment and on the stability of economic growth in the former host country. Thus, it is not coherent strategy merely to protect FDI in international law while not protecting the economy and people affected in the host country from the impact of disinvestment (Leader, 2006).

With regard to these interactions, the economic literature is inconclusive as to whether trade and migration are ‘substitutes’ or ‘complements’ (Lopez and Schiff, 1998, p. 335, on low-skilled labour as a complement to trade and skilled labour as a substitute; Hatzigeorgiou, 2010, on the trade facilitating effect of emigrants and immigrants; Martin, 2003, on the requirements for migration to be a complement of trade). Recent work suggests that they are complements in the short-run and substitutes in the long-run (migration hump theory: Martin

and Taylor, 2001). The link between migration and FDI so far has not been prominently covered by the literature. However, it is generally agreed that there is a strong link between investment regulation and migration pressure in sending countries (Trachtman, 2009, p. 47).

This study departs from these foundations, but attempts a legal discussion of the triadic relationship between trade, investment and migration. It focuses on the consequences of legal fragmentation through different – and often incoherent – regulation in these three policy areas and points towards opportunities for more coherent regulation without having to wait for an international institution which can finally organize migration regulation in a coherent and encompassing manner.

(a) Legal fragmentation of trade, investment and migration regulation

The legal fragmentation in global regulation of trade, investment and migration has its roots in the major international institutions governing each policy area and the regulation each institution and field has implemented. The relevant institutions here are the WTO with its trade agreements, the International Centre for Settlement of Investment Disputes (ICSID), bilateral investment agreements, the United Nations (UN) and its migration fora (GFMD, GCIM), the International Labour Organization (ILO) and the International Organization for Migration (IOM).

In all three areas, global norms have been established which interact with labour migration. The weakest link in this chain is migration regulation, as current regulation consists mainly of soft law established by various non-binding international frameworks, including the Global Forum on Migration and Development (GFMD) and the UN High Level Dialogue on Migration and Development.[1] The few binding commitments in migration regulation are difficult to enforce due to a lack of appropriate enforcement mechanisms. In fact, the only binding com-

mitments in place to limit national sovereignty are commitments under GATS mode 4 in WTO law and the non-refoulement principle in refugee law (Panizzon, 2010, p. 1210). Given the sensitivity of migration from the point of view of sovereignty and the nation state, the lack of will to create common institutions and rules comparable to those in other areas of international law, in particular trade, is hardly astonishing.

On the other hand, commitments in trade regulation under the WTO and in investment regulation through bilateral investment treaties (BITs) are binding. The difficulties for international cooperation which follow from this constellation can be nicely illustrated through a typology of the different international regimes (Hollifield 2006, p. 19): the international institutions concerned with refugees and political asylum (UNHCR) and with international labour migration (ILO and IOM) are rather weak institutions, whereas the institutions of finance (IMF and World Bank) and trade (WTO) are considered to be strong.

With a few exceptions, all three areas use the same legal instruments available in international law for establishing commitments: international or multilateral agreements, regional agreements, bilateral agreements, general principles and customary law, and finally, national legislation. Figure X.1[2] gives an overview of the various legal channels in trade, investment and migration, based on the number of agreements in each area.

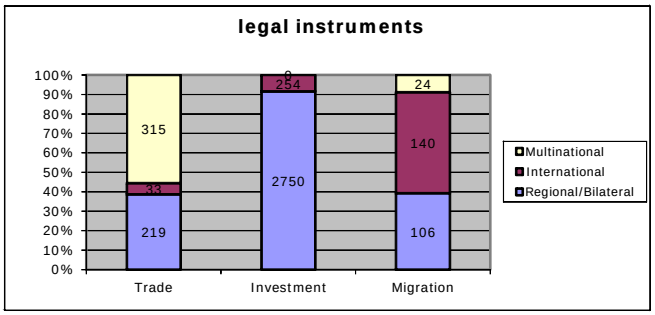

Figure X.1. Legal channels in trade, investment and migration, based on the number of agreements in each area. (Source: author)

Trade and migration norms can be found in the same legal instruments on the multilateral, the regional and the bilateral levels. However, more often than not, these norms are not part of the same agreement, but are addressed in separate instruments. This is equally true for investment protection. It has very few formal ties with trade and migration regulation, although WTO law, to a substantial extent, not only protects trade but also investment. It is mainly organized by means of regional and bilateral agreements, with no substantial international or multinational regulation aside from the treaties of ICSID. Given that the challenges for the regulation of labour migration will grow in the future rather than diminish – an ageing population in the West, population growth in the South (e.g. in the case of the UK see Cangiano, 2012) – this wide fragmentation is a critical factor that must be taken into account in devising successful policies which will guide labour migration onto a productive and well-regulated course (Castles and Miller, 2003).

This study refrains from the analysis of national legislation and will focus on international law. In doing so, we are aware of the importance of national norms, particularly in the case of migration regulation. We recall that the fragmentation of trade, investment and migration policies discussed above is not primarily an international issue but has its roots in the general problem of misaligned policies on the national level. These policies eventually translate to the regional and global levels of governance. At the national level a number of countries have made efforts in the area of migration to bring related policy fields, such as trade, develop-

ment, labour, and security, into a coordinated, coherent framework, which has been labelled the 'whole-of-government approach' (see Kunz, Lavenex and Panizzon, 2011). We thus focus on how to achieve some sort of 'whole-of-government approach' on the international level.

Trade and investment regulation follow their own logic. This has to be understood before their contribution to reducing migration pressure can be discussed. The paper thus briefly explains the history and fundamental principles of the World Trade Organization (WTO) and the structure of the major trade agreements, as well as the current issues concerning the regulation of FDI. It points out several areas in trade and investment regulation that are of particular interest in relation to migration policy. Finally, it discusses ways to reduce the level of legal fragmentation in trade, investment and migration regulation. We begin by assessing the costs of fragmentation.

II. THE COST OF FRAGMENTATION

According to the theorem of welfare economics (Trachtman, 2009, p. 36), the best economic outcome is generated if liberalization and competition bring the best players together in every aspect of the process of production, including labour. The loss of efficiency caused by protectionist regulation, which hinders global competition in all three areas – including labour – burdens the economy with high consumer prices, unemployment, migration problems, and missed welfare gains:

> The very fact that migration has lagged substantially behind the other dimensions of globalisation also makes it the largest opportunity for additional global welfare gains – especially today, when further multi-

> lateral trade liberalisation is in considerable doubt (Ranis, 2006, pp. 285–6).

A number of well-known controversial policies in investment, migration and trade lead to policy contradictions, which cause losses in efficiency on many levels. For example, while emigration is included in global regulation through human rights, which gives individuals the right to emigrate, immigration is excluded from regulation on the global level. It leaves individuals (except for refugees) with no rights vis-à-vis the destination states. Of course, the right to emigrate without a right to immigrate may be viewed as rather empty (Trachtman, 2009, p. 180). Furthermore, even though migration cannot be banned in today's world, governments all over the planet still attempt to substantially limit migration by the force of law mainly for ethnic and cultural reasons:

> If governments welcome the mobility of capital, commodities and ideas, yet try to stop the mobility of people, they are unlikely to succeed. Realistic policies may help shape migration in the public interest. Prohibitions, by contrast, are unlikely to stop migration, and may simply change legal movements into illegal ones (Castles, 1998, p. 181).

Control of borders is viewed as inherent to state sovereignty, even though national immigration controls limit flows of one factor of production – people – in much the same way that tariffs limit flows of goods (Keely, 2003, p. 88). This becomes particularly evident in the case of GATS: under the GATS regime, limiting the movement of service suppliers – including natural persons – constitutes a barrier to trade in services. Thus, with respect to limiting temporary immigration of service suppliers, trade and migration policies collide head on (Keely, 2003, p. 89).

Certainly, labour migration cannot be compared to free movement of goods, finance and services. It is self-evident that the movement of people comes with a wider range of policy implications than goods do. These differences are likely to be the reason for the restrictive immigration policies all around the world: policymakers in the nation state continue to struggle with the social, cultural, ethnic, educational, political and economic implications of labour migration (see Putnam, 2007; Mayda, 2008).

Arguably, however, if policies were better aligned, the implications of labour migration for the receiving country would be easier to cope with, and, particularly in the long-term, migration pressure may be reduced to a minimum, as it is in the nature of human beings to stay with – or return to – their families, if the living conditions are more or less tolerable (e.g. Murrugarra, Larrison and Sasin, 2011). Thus, while it is often reasonable to restrict immigration as a consequence of the uncertain and unmanageable social, political and economic implications of migration, these restrictive policies may at the same time contribute to the overall problem of migration pressure from poorer countries: by keeping poorer people out, the gap between rich and poor – and with it the main reason for labour migration – will not diminish any time soon (e.g. Dos Santos and Postel-Vinay, 2003).

III. TRADE AND MIGRATION

Not only contradictions in policies, but also trade regulation in general, have an impact on migration pressure in sending countries. While, in theory, globalization aims at empowering all stakeholders involved in global trade, and the developing world has substantially increased its share of global trade in recent decades (Ali, 2009), not all countries, in particular least-developed countries, have benefited as much as was hoped from the global free trade regime (e.g. Dollar and Kraay, 2007). They have remained under migration pressure and sub-

stantially dependent upon remittances. We suggest a number of angles (indirectly through liberalization in agriculture, tax reductions for knowledge transfer and fair-trade labelling, and directly through broadening and better implementation of GATS mode 4 regulation) from which migration pressure and global labour migration can be positively guided through trade regulation.

(a) Short introduction to the world trade system

The establishment of the WTO (1995) resulted from the ever-increasing complexity of successive trade agreements (see generally Cottier and Oesch, 2005). It builds upon a long-standing dispute settlement mechanism under the General Agreement on Tariffs and Trade (GATT) which was founded in 1947. It provides a common structure to GATT 95, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Dispute Settlement Understanding (DSU). Other than for the DSU, the WTO did not fundamentally alter the traditions of the GATT 47, the original instrument of global trade regulation. Since 2001, Members to the WTO have been negotiating on the basis of the Doha Development Agenda. So far, no results have been achieved.

Worldwide, overall tariffs on industrial goods (first-generation trade barriers) were reduced from 40 per cent ad valorem to 4 per cent between 1947 and 1993 (BBI, 1994, p. 134). The WTO then went on to address second-generation trade barriers, such as technical barriers to trade, subsidies and anti-dumping disciplines. In the Uruguay Round, third-generation barriers to trade in domestic regulation were addressed, including services, intellectual property, and domestic support levels for agriculture.

Members of the WTO, and multilateral trade regulation per se, follow a number of important legal principles. First, multilateral trade liberalization is built on the principles of non-discrimination: most-favoured nation[3] and national treatment.[4] Furthermore, the multilateral trade system is based on progressive liberalization of trade in goods and services, with the final goal of a global market. Protection of intellectual property is an important factor in international trade, extending trade regulation to cover ideas and knowledge. Another important pillar of the WTO is the principle of transparency, which applies to all actions and agreements of the WTO.[5] The principle of consensus in decision-making, on the other hand, ensures equal treatment of all Members and requires that all Members agree on the decision to be taken[6].

Finally, the binding dispute settlement and enforcement mechanism of the WTO is unique on the multilateral level and ensures that trade regulation is implemented and enforced.[7] Commitments under the WTO are subject to mandatory dispute settlement. Members are entitled to submit claims and respondents are obliged to engage in dispute settlement, which takes the form of judicial proceedings before panels and, upon appeal, before a standing Appellate Body. Decisions taken formally by the Dispute Settlement Body upon recommendations of panels and the Appellate Body are subject to mandatory enforcement by means of increased import duties or other measures taken by the complainant upon clearance by the WTO membership. Defendant Members are not in a position to block these decisions. Overall, the WTO achieves a high level of compliance. Of more than 350 disputes launched since 1995, only a few faced countermeasures and have remained unimplemented. Today, WTO dispute settlement amounts to the core activity of the Organization.

Since the Doha Round negotiations have not produced results so far, many countries have turned to bilateral and regional trade liberalization. Worldwide, the number of preferential trade agreements (PTAs) has been growing exponentially over the past ten years and these

agreements increasingly include new areas of trade regulation and aim at greater liberalization than has been achieved under the WTO framework (e.g. Baldwin and Carpenter, 2009). Thus, bilateral and regional trade agreements have become an important factor in trade regulation worldwide and need to be considered in any policy advice.

PTAs building upon and extending beyond the commitments under WTO law have been labelled 'WTO-plus'. PTAs including new areas of regulation have been termed 'WTO-extra' (Horn, Mavroidis and Sapir, 2010). Both are particularly relevant in the case of temporary labour migration: often, PTAs offer more in terms of level of liberalization and access to the labour market than has been achieved under the GATS mode 4 regulation. PTAs and emerging new forms of regulation and of issues covered by regulation may serve as a laboratory for the multilateral level and may potentially inform future amendments to the GATS and other WTO law.

(b) The indirect link between trade and migration pressure: agricultural liberalization, fair-trade labelling, tax breaks and graduation

There are different avenues and angles at the global level in trade by which migration pressure and migration flows could be positively influenced. While GATT 1995 does not directly deal with labour migration, the GATS – as the only WTO Agreement to cover any aspect of migration – includes provisions regulating the temporary entry of service suppliers to another country. Thus, in areas of WTO law other than GATS, such as those dealing with goods and intellectual property, links to migration policy are indirect. They are nevertheless relevant, because trade regulation is strong and has a direct impact on the working and living conditions in traditional sending countries.

Under GATT regulation, enhancing market access for agricultural products by industrialized and emerging economies is a well-known factor for promoting economic development and securing jobs in developing countries (Castles and Miller, 2003, p. 285). The effort should be more closely related to migration pressures and the need to create sustainable work and opportunities in exporting countries. The same holds true for the textile industry which – as a consequence of policies after the financial crisis (Frederick and Gereffi, 2009) – is still subject to relatively high levels of protection in industrialized countries. Reduction of tariffs and of tariff escalation (e.g. the difference between tariffs on raw materials and manufactured products based upon such materials) are equally important tools in providing developing economies with opportunities and jobs. Non-tariff barriers to trade, including food standards, constitute a related factor affecting the economic potential of developing economies. Thus, further liberalizing non-tariff barriers to trade would assist in gaining access to markets for products from developing countries.

The clarification and reinforcement of fair trade labelling within the WTO framework could have an impressive impact on job security and working conditions in sending countries (see Archer and Fritsch, 2010). Given that most people prefer to stay with their family and in their home country (see Murrugarra, Larrison and Sasin, 2011), better working conditions and job security are certainly strong arguments for staying or for returning.

Certain developing countries have been including a local content employment requirement in their GATS mode 3 commitments so as to ensure that foreign firms establishing commercial presence in their country employ the local workforce. Rethinking the prohibition of local content requirements in goods for countries where there is high unemployment and thus migratory pressure would be worthwhile. Such an amendment to the WTO law would mainly affect the GATT, the Agreement on Trade-Related Investment Measures (TRIMs) and the Agreement on Government Procurement (GPA).

Another angle exists in the TRIPS Agreement in Article 66:2, which requires industrialized countries to provide knowledge and technology transfer to least-developed countries. One option to explore here is granting tax breaks to companies which engage in knowledge transfer to least-developed countries. Such a system could be expanded to other policy areas. For example, companies engaging in and contributing to circular migration, as well as contributing to sustainable economic growth and value-added production, could be compensated by tax reductions at home in public recognition of their contributions.

Finally, obligations under WTO law should take levels of competitiveness and participation in international trade into account more coherently by introducing graduation (see Cottier, 2006) beyond the current and largely ineffective regimes of special and differential treatment[8] and an increasingly eroding enabling clause.[9] Allowing, where suitable, for different levels of regulation and liberalization beyond current tariff and services schedules according to the level of competiveness and economic development of a Member of the WTO may provide a basis for developing countries to use their comparative advantage and secure jobs in their country, offsetting migration pressures.

(c) The direct link between trade and migration: GATS mode 4

The GATS is the only multilateral agreement that embodies binding and enforceable provisions on cross-border movement of persons (restricted, however, to service suppliers). Through mode 4 supply of services, service providers – natural persons included – are entitled to enter another country temporarily in order to supply a service. These norms on temporary labour migration are, however, still rudimentary, since visa policy, which is the main barrier to free movement of persons, falls outside the GATS jurisdiction, and because the

GATS only concerns service suppliers and thus excludes agricultural workers, the main group of economic migrants.

Recently, there have been proposals by countries such as India to include provisions on a fast-track visa procedure for foreign service suppliers into WTO law, the so-called GATS mode 4 visa.[10] The proposal was met with opposition by industrialized countries which feared losing control over one of the last pillars of state sovereignty, notably sovereignty over borders and admissions. The main criticism with respect to fast-track visa procedures and liberalized temporary entry of service suppliers is that 'temporary' often turns into 'long-term' migration (e.g. Miller, 2000, p. 36). Once a person has crossed the border and is participating in the labour market, it is difficult to enforce limitations of the stay (e.g. the phenomenon of unification with families of guest-workers in Europe: Martin, Abollo and Kuptsch (2006), p. 16).

Another recent proposition is the multilateral recognition of non-formal qualifications (such as number of years of professional experience, because formal certificates often either do not exist or are not recognized due to considerable differences in the level and form of education around the world) through skill-testing and other measures (Panizzon, 2010, pp. 1224–5). Internationally agreed criteria on non-formal qualifications in the area of services trade would create jobs in and open new markets for developing economies.

Perhaps most importantly, WTO Members have been debating whether to extend their commitments in GATS mode 4, which so far have been biased towards the highly skilled and persons with key managerial functions, to cover low-skilled labour. Developing countries in particular are pushing this idea, as temporary labour migration for low-skilled labour would enable their labour force to use its comparative advantage on the global market. Possibly, modes of graduation in the regulation of temporary labour migration within the WTO framework are worth discussing: through graduation in entitlement, criteria for non-formal qualifi-

cations and visa-procedures (meaning that certain groups of professionals are treated preferentially, thus, through extending admission to low-skilled labour taking a step by step approach), a consensus among Members to the WTO might be achieved.

Somewhat less realistic in the short run, but nevertheless worth discussing seriously in the future, is the possibility of including a multilaterally agreed system of work authorizations into WTO law (on the role of GATS mode 4 in future migration regulation, see Panizzon, 2010). Such a system would render GATS mode 4 much more straightforward, easy to implement, and suitable for the regulation of labour migration. This would be particularly valuable as today, partly due to the positive-list approach of the GATS[11] and domestic authority over visa procedures, the specific entitlement of a service supplier with respect to entering a specific country remains unclear.

(d) Relevant aspects of trade policy for migration: bilateral and/or regional?

Regulation is more flexible on the regional and bilateral level because it is easier to achieve consensus, partners in an agreement have similar – or compatible – interests (among others because countries may share cultural and political values and resemble each other: Castles and Miller, 2003, p. 285), and new forms and areas of regulation can be added to the agreement, providing extra room for balancing the benefits for each country involved (Horn, Mavroidis and Sapir, 2010, p. 1580; Nielson, 2003). Given the rising number of bilateral and regional trade agreements (e.g. OECD, 2003), thinking about the impact of the latter on migration pressure is timely. More and more trade agreements are including migration-related regulation, including establishing special visas or fast-track admission procedures for natural persons providing services (Panizzon, 2010, pp. 47–9).

However, PTAs have not led to any significant progress in GATS mode 4 regulation. The true progress has been achieved through bilateral temporary migration agreements, which grant access levels also for the movement of low-skilled workers. Carzaniga (2008, pp. 500–1) points out that while further developing and extending GATS mode 4 regulation may be more viable on the multilateral level, access to the labour market is currently more feasible on a bilateral level.

Adding migration regulation as a pillar to PTAs would allow for flexible – tailored – regulation of migration in a bilateral or regional context.[12] Aspects which could be considered include market access regulation, regulation and promotion of circular migration, extension of commitments on the temporary movement of natural persons to cover low-skilled labour, and educational components. All these aspects are currently more likely to be agreed upon on a bilateral or regional level, and there is a considerable chance that best practices might inspire the global community and the WTO (Trachtman, 2009, p. 276).

Particularly interesting on the regional and bilateral level of regulation are the so-called economic partnership agreements (EPAs). Panizzon (2010, p. 1208) describes them as follows:

> EPAs are adopting migration steering tools of non-trade bilateral agreements, such as skill-testing, institutionalised recruitment processes, and migrant return guarantees. By combining elements of both trade and non-trade agreements, EPAs bring about a certain level of coherence within this fragmented landscape of trade and non-trade agreements.

EPAs have found a way of better balancing the benefits of migration against its risks and thus constitute a possible prototype for a global ‘whole-of-government approach’.

IV. INVESTMENT AND MIGRATION

Although trade liberalization can contribute to a reduction of migration pressures caused by economic imbalances, even the most liberal trade policy cannot fully address the problems of poverty and inequality. Remedies mainly depend upon domestic policies of growth and redistribution, but also on allowing for enhanced international capital flows and labour mobility (Sauvant, Mallampally and Economou, 1993, p. 36). Encouraging circular migration is seen as key to more coherent policies in trade, investment and migration. Paradoxically, both in the sending and the receiving country, restrictive policies tend to encourage permanent migration and even to discourage circular migration.

Thus, policies of the sending country, which create an attractive social, economic and political environment, may encourage migrants to remain involved with their home country. A crucial role in this is attributed to an attractive investment environment, which not only encourages FDI through remittances but also strengthens the ties between expatriate and home-communities (De Haas, 2005, p. 1281).

(a) Short introduction to international investment regulation

International investment regulation currently consists of a highly fragmented network of mainly BITs, double taxation treaties (DTTs), and the broader international investment agreements (IIAs) (for general information see Sornarajah, 2010). Regulation consists of national, bilateral and a few regional agreements, while, as yet, no agreement exists on the international level. The existing regulation serves the main cause of protecting the investor and the investment against expropriation and other loss. The reason for this single most important aspect of investment protection is that poor countries need FDI quite urgently and FDI only

comes to them if investors trust that their investment is safe. However, this one-dimensional focus on investor rights and investment protection has been increasingly criticized and a new consensus is starting to unfold, which has led to rethinking the balance of rights and obligations (Leader, 2006, p. 703).

The number of IIAs[13] is increasing year by year and in 2009 had exceeded 6000 agreements worldwide (UNCTAD, 2009). Along with the increasing number of agreements, FDI flows have been increasing as well: global FDI inflows increased fourfold from 500 billion USD in 1997 to 2000 billion USD in 2007 (UNCTAD, 2012, p. 3). They dropped in the aftermath of the global financial crisis in 2008, but are increasing again.

Despite the financial crises, levels of FDI flows remain high and FDI is still an important factor in creating opportunities for economic growth in developing countries. FDI flows to developing countries – unlike those to developed countries – had already reached pre-financial crises levels in 2011. In fact, between 40 per cent and 60 per cent of net capital inflows to developing countries are FDI, therewith equalling capital inflows from official donors (World Bank, 2003, p. 3). Thus, regulation of FDI can no longer be ignored by policy makers as it has a considerable impact on any other policy area and vice versa.

FDI has become a major factor in creating and securing jobs, as well as in stimulating economic growth all around the world. Thus, back in 1995, FDI was already meant to play a role in reducing migration pressure and in creating jobs in sending countries (Martin, 1995, pp. 823–4). However, the focus of policy and regulation has so far been more or less exclusively on the protection of the investment and the investor. This situation has recently changed with several initiatives preparing for a global treaty, and new BITs, which include other policy aspects beyond simple investment protection (Dimopoulos, 2008, pp. 21–2).

FDI is particularly interesting with respect to its impact on migration, as it works on both sides of the economic equation: it reduces push-factors through employment and growth, and it reduces pull-factors through reducing the wage differentials between countries (Sanderson and Kentor, 2008, pp. 519–20). Thus, in a way, FDI acts like a substitute for migration on different levels and in different ways, leading to less migration overall. However, FDI also has complementary effects on migration, e.g. through information transfer and a reduction of transaction costs between countries of origin and destination (for a comprehensive discussion see Kugler and Rapoport, 2007).

Extending investment regulation and policy to the people concerned by the investment, and to the country hosting the investment, creates opportunities for an indirect impact on migration pressure and on the working conditions in sending countries. While FDI may have a greater impact in middle-income and high-income countries than in low-income countries (amount of FDI present, key requirements for economic growth), it may serve, however, as an important supplement to domestic investment and development assistance in low-income countries (Sauvant, Mallampally and Economou, 1993, p. 55).

The following paragraphs outline a possible direction for investment policy and regulation in the future, which could have a positive impact on working conditions, migration pressure and job security in sending countries.

(b) Indirect impact of FDI on migration pressure: job creation

Given that few provisions outside the core of investment protection have been included in investment regulation so far, there is a wealth of possible issues closely linked to investment regulation, which have an impact on migration pressure and working conditions in sending countries.

First – and policy makers are already working on this – investment regulation needs to incorporate a proper balance of rights and obligations, committing not only the host country to investment protection, but also the investor to certain obligations (see Spence and Leipziger, 2010). Of general importance is the implementation of transparency rules in investment regulation. More innovative are ideas like encouraging and promoting sustainable investment through investment regulation, a strengthening of corporate social responsibility, and the inclusion of binding labour standards.

Additionally, sovereign wealth investment should be limited in the future and investment dispute prevention, as well as binding, cost-effective judicial dispute settlement, ought to be included in investment regulation. Finally, the rule of law could most likely be promoted quite effectively through inclusion in investment regulation as this is the best guarantee for secure investments (see e.g. Ahlquist and Prakash, 2008).

More recent BITs include general exception clauses and draft them in a more complex manner than before. Issues included in investment regulation are taxation, security, public order, protection of human health, environment, cultural diversity and prudential measures in financial services. Thus, while labour standards have become an important part of investment regulation, often they remain in the form of a political statement in the preamble of the treaty (United Nations, 2007, pp. 96–9). The operational linkages of investment and labour are mainly found in the trading system and the GATS.

More than half of all commitments under GATS mode 4 are currently conditioned on the commercial presence of a foreign service supplier under GATS mode 3. Thus, temporary movement of labour is ‘complemented by the parallel inflow of foreign capital’ (Panizzon, 2010, p. 1222). Through taxes which the foreign investor pays, costs that GATS mode 4 service suppliers may impose on the domestic welfare system are covered, therewith establishing a clear link between trade, investment and temporary movement of persons.

(c) Direct link of FDI to migration in bilateral agreements: intracorporate mobility and other skill-upgrading effects

Similarly to trade policy, innovative investment regulation today takes place mainly on the regional and bilateral levels: as long as no global agreement on investment regulation exists, regional and bilateral agreements are not bound by international commitments to a certain form or content. In order to prepare the terrain for a future multilateral agreement on investment regulation, regional and bilateral investment agreements concerned with the impact of the investment on the economy and people of the host country should add migration as a pillar to the agreement. Regional and bilateral agreements have the task of preparing global standards in investment regulation through a process of trial and error and best practices (Franck, 2011, pp. 73–4). The sooner migration becomes part of the policy, the more certain it is to be included on a general basis in the future.

Additionally – but no less importantly – commitments in the field of knowledge transfer and education should be included in investment regulation, as this has proven an important factor in sustainable investment and has been shown to have a positive impact on the prospects for economic growth in the region overall (e.g. Saliola and Zanfei, 2009). Investing in human capital and the local workforce promises rewards for the host country on multiple levels.

FDI directly reduces the immediate desire to emigrate of those who seek employment or improved economic opportunities. Although the overall impact of FDI on employment in the domestic market in a sending country may be limited, particularly within export-oriented industries, it is nevertheless significant: local employees in these industries often enjoy higher incomes than their affiliates in local companies (Sauvant, Mallampally and Economou, 1993, p. 55).

Recent BITs typically include a provision concerning the employment of key personnel, ensuring that investors are able to employ key managerial or professional personnel of their choice. Thus, for a limited number of people – but as a consequence of somewhat vague formulation, not necessarily for a clearly distinguishable group of people – BITs include provisions which grant access to the labour market (United Nations, 2006, p. 97).

In some cases, host countries require FDI to employ local labour, in order to increase employment and raise the skill level of the domestic workforce. Additionally, host countries may require that a number of positions for managerial personnel or directors in FDI operating in key industries be reserved for nationals of the host country. However, these provisions have to be carefully balanced to allow the investor to control the investment while making the FDI conducive to domestic economic policy (United Nations, 2006, p. 99).

V. TOWARDS MORE COHERENCE – CONCLUSION

There are three main reasons for considering the impact of migration in trade and investment regulation: 1) The global labour market is to a large extent shaped by trade law, particularly in the case of temporary labour migration. 2) There is no likely alternative on the multilateral level, as efforts to found an international organization for migration regulation have not yet met with success. 3) National legislation is bound to fail sooner or later, as national regulation is not capable of managing a global phenomenon in a comprehensive and effective way.

This paper shows that migration policies on the international level are lagging behind trade and investment. It discusses how migration policy could be more meaningfully included in the existing framework of trade and investment regulation, possibly with rapid and impressive effects. Considering aspects of migration in trade and investment regulation, which may

have – indirectly or directly – a positive impact on labour migration, will help to bring about more coherence on the multilateral level. Directing all three factors of international production – trade, investment, and labour – towards more efficient employment can only be achieved through more coherent, considerate policies in all three areas.

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Notes

[1] For more information see: http://www.gfmd.org and http://www.un.org/migration/ (date accessed 30 March 2012).

[2] Based on number of agreements in each channel: WTO, notified Agreements: http://rtais.wto.org/UI/PublicAllRTAList.aspx; In 2009, UNCTAD:

http://www.unctad.org/en/docs/diaeia20102_en.pdf; IOM database: http://www.imldb.iom.int/search.do?action=search.

[3] Most-favoured nation in short: The right to the same treatment as accorded to the nation which benefits from the 'most-favoured' conditions. This principle guarantees continuing trade liberalization.

[4] National treatment in short: The obligation to treat foreign products like national products, services or persons. Where it applies, this principle guarantees true liberalization as it opens the market entirely.

[5] Trade Policy Review Mechanism (TPRM), Annex 3, Agreement Establishing the World Trade Organization.

[6] Article IX, Agreement Establishing the World Trade Organization.

[7] Dispute Settlement Understanding (DSU), Annex 2, Agreement Establishing the World Trade Organization.

[8] Special and differential treatment is based on provisions in all of WTO law, which give developed countries the possibility to treat developing countries more favourably. This is particularly interesting in the case of indirect migration policy because it allows developed countries to adjust their trade policy in developing countries to support the labour market in place and to promote sustainable economic growth in a region.

[9] The enabling clause allows developed countries to give differential and more favourable treatment to developing countries. This is particularly interesting in the case of direct migration policy because it allows for labour migration agreements which are tailored to the needs of the countries involved.

[10] Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS), WTO-Document S/CSS/W12 (24 November 2000), Communication from India, Special Session, Council for Trade in Services.

[11] The positive-list approach means that countries enter an individual list of commitments, unlike the negative.-list approach, where all countries enter the same commitments except for an individual list of exemptions. Thus, based on the positive-list approach, each signatory country of the GATS committed to an individual, differing level of liberalization in the different services sectors and modes of supply. Service suppliers willing to enter a foreign services market have, thus, to check the individual schedules of each of the countries concerned before knowing their rights and obligations.

[12] Because of restrictions of MFN and particular flexibilities granted to PTAs under WTO law.

[13] IIAs include BITs and double taxation treaties (DTTs) and any other form of investment agreement.